IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

NO. .....

WEIRTON STEEL COMPANY, Petitioner,

v.

COSTANZO COAL MINING COMPANY.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinions Below.

The Opinion of the District Court was entered on January 3, 1945 and is reported in 58 F. Supp. 493.

The Opinion of the Circuit Court of Appeals was entered on July 26, 1945 and is included in the record but is not yet officially reported.

Jurisdiction.

The judgment sought to be reviewed is a final judgment of the Circuit Court of Appeals for the Fourth Circuit, reversing and remanding a judgment of the District Court of the United States for the Northern District of West Virginia. The jurisdiction of this Honorable Court is invoked under Section 240(a) of the Judicial Code, as amended, 28 U.S.C. 347(a).

Statute Involved.

The statute involved is the Bituminous Coal Act of 1937, 50 Stat. 72, 15 U.S.C. §828 *et seq.* The Act expired by its terms on August 24, 1943, after two extensions.

Statement.

The essential facts are summarized in the Petition for Certiorari under the caption "Summary Statement of the Matters Involved" (*supra* pages 2 to 7).

Specification of Errors to Be Urged.

The Circuit Court of Appeals erred:

1. In holding that the Bituminous Coal Act of 1937 creates an implied contract on the part of a purchaser of coal to pay the minimum prices for coal purchased from members of the Code, despite the fact that the coal was purchased and paid for pursuant to an express contract calling for lower prices, which the purchaser, relying on assurances of the seller's agent, assumed to be valid; and

2. In holding that a wrongdoer may repudiate transactions with an innocent party to a fully executed contract on the ground that such contract was unlawful under a statute applicable only to the wrongdoer, and recover from the innocent party on an implied contract predicated upon such statute.

Summary of Argument.

The substantive and remedial measures of the Bituminous Coal Act and the Bituminous Coal Code in terms apply *only* to persons joining the Code. An analysis of the Act and its legislative history demonstrates that no obligation was placed upon the buyer of coal to investigate or observe minimum prices established under the Code. The Circuit Court nevertheless held that a person who was subject to the Code can set aside a fully executed contract with an innocent party on the ground that it violated the Code and impose upon such innocent party prices higher than it had agreed to pay. (a) This ruling is contrary to well established decisions of this Court and of various Circuit Courts that the guilty party to a fully executed contract may not recover against an innocent party on the ground that the transactions between them violated a statutory or other obligation of the guilty party. (b) The ruling also substantially extends the Act beyond its expressed scope and therefore presents an important question which should be decided by this Court.

Argument.

I.

THE DECISION OF THE CIRCUIT COURT IS IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

Although an argument on the merits is inappropriate at this stage of the proceedings, some reference to the underlying points of law is essential to a clear exposition of the case.

The Bituminous Coal Act of 1937 was not a self executing statute, nor did it apply to all producers of bitu-

minous coal. It did not *require* that coal be sold at certain prices or that the sellers of coal observe certain competitive practices, but merely provided a procedure by which coal operators could join in an agreement to establish fair trade rules and minimum price standards. It is true that the individual's freedom to remain aloof from the Code was restricted by a penalty tax of 19½% on non-conformists, but the statutory option nevertheless existed and was considered by this Court as an important factor in sustaining the constitutional integrity of the legislation:

> *Sunshine Anthracite Coal Company v. Adkins,* 310 U. S. 381, 60 S. Ct. 907 (1940).

It is equally clear that neither the Act nor the Code purports to impose any duty or obligation on the buyer of coal or to create any remedy against him. Thus Section 4 of the Act, which contains the Code, states explicitly that:

> "Producers accepting membership in the code as provided in section 5(a) shall be and are herein referred to as, code members, and *the provisions of such code shall apply only to such code members,* except as provided by sub-section (b) of Part II of this section." (Emphasis supplied)

(The proviso referred to in the exception extends the Code to one other group, i.e., registered distributors.)

Other provisions of the Act and Code confirm the intent of the opening limitation set forth above. Thus sales below the minimum prices or above the maximum prices established by the Division are not characterized as violations of the Act but as violations *"of the code"*

[Section 4, II (e)] and the unfair trade practices which the Code proscribes are also called "violations *of the code*" [Section 4, II (i)]. A similar restriction of the application of the Act and Code can be found in the choice of remedies, both of which are directed against *members only*. The principal enforcement device was of course the power of the Division, in proceeding before it (reviewable by the Courts of the United States—see Section 6) to revoke a producer's membership and therefore his tax exemption and to make it a condition of reinstatement that the defaulter pay to the United States "double the amount of the tax * * * upon the sales price * * * of the coal sold or disposed of *by the code member in violation of the code or regulations thereunder.*" [Section 5(b) and (c)] The second, and *only other,* remedy was a suit for treble damages by an injured Code member against another *member* under Section 5(d).

The intent of Congress to confine the application of the substantive and remedial measures of the Act and Code to members is confirmed by the legislative history of the Act. Thus after the Bill had passed the House of Representatives, the Senate inserted several amendments, one of which provided that:

> "Any person, firm or corporation or other entity who shall knowingly purchase coal from any code member in such a manner that the sale of such coal constitutes a violation of the code on the part of such code member shall be deemed guilty of a misdemeanor and upon conviction thereof shall suffer a fine not exceeding $1 for each ton of coal so purchased" (see Section 10(d) of the Senate Bill).

Another Senate amendment sought to accomplish *the very result which the Circuit Court's decision attributes to the statute as enacted,* by proposing that:

> "Any *contract* made on or subsequent to said date (i.e. June 16, 1933) which provides for a price below such established minimum price level *shall be unenforceable as to such price provision."* (See Senate Bill, Section 4, II (e)—emphasis supplied)

Both amendments were eliminated by the Conference Committee of the House and Senate, which surely supplies wellnigh conclusive evidence that Congress never intended to penalize the buyer for the seller's delinquencies or to make all contracts, other than pre-Code agreements, invalid.

As a consequence, the case before the Court presents these essential features: (1) The respondent, by registering as a distributor under the Marketing Rules of the Code, in effect agreed that it would sell at the specified minimum prices; (2) the transactions between the petitioner and the respondent arose under a formal contract which the respondent represented to be exempt from Code regulation; (3) the respondent was engaged in the coal business and was presumably familiar with the scope of the regulatory features of the Code, whereas the petitioner was not; (4) the contract between the parties was fully executed, in the sense that the petitioner paid the prices specified by the respondent and the respondent accepted such payments as in full liquidation of the accounts between them; and (5) as soon as the petitioner was advised of the respondent's violation of the Code, the contract was terminated.

On these facts, the Circuit Court held that the contract between the parties was illegal and unenforceable, that there should be imposed in lieu thereof an implied contract (implied "in law" because no such factual implication was possible) to pay Code prices and that the plaintiff's misconduct was no bar to recovery. This ruling, it is submitted, is clearly contrary to many rulings of this Court and conflicts with well established principles of Federal Law.

This Court has held, since the days of Chief Justice Marshall, that the Federal Courts will not lend the assistance of their process to either party to an unlawful bargain. For example, in *Brown v. Tarkington,* 70 U. S. 377, 18 L. Ed. 255 (1866), this Court refused to permit recovery upon certain promissory notes of a bank which had been organized and had transacted its business under a territorial statute but without complying with the Federal Organic Law. In overruling the plaintiff's contention that the illegal organization of the bank had no bearing on the validity of the notes, this Court stated, at 70 U. S. 380:

> "The only material question open was, whether or not the plaintiff was *particeps criminis.* If he was, he was disabled, under the maxim, to recover. The law leaves the party thus situated where it finds him."

Again, in *Whitfield v. United States,* 92 U. S. 165, 23 L. Ed. 705 (1876), this Court announced the general principle as follows:

> "As a general rule, the law leaves the parties to illegal contracts where it finds them, and affords relief to neither" (92 U. S. 169).

Other decisions to the same effect are *Oscanyan v. Winchester Repeating Arms Co.*, 103 U. S. 261, 26 L. Ed. 539 (1881); *Weil v. Neary*, 278 U. S. 160, 49 S. Ct. 144 (1929).

The same doctrine seems to be a matter of general law (See *Williston on Contracts* (Revised Edition), Volume 5, Section 1630) and has been followed in several decisions of the various Circuit Courts.

> See for example, *Roberts v. Criss*, 266 F. 296 (C.C.A. 2d, 1920); *Oregon Short Line R. Co. v. American Smelting & Refining Co.*, 269 Fed. 898 (C.C.A. 8th, 1920).

In this connection, it is difficult to reconcile the decision of the Circuit Court with its own prior decision in *Detroit Edison Co. v. Wyatt Coal Co.*, 293 F. 489 (C.C.A. 4th, 1923). In that case, the plaintiff had purchased quantities of coal from the defendant at prices in excess of the prices fixed by the so-called Lever Act. The Lever Act, it will be recalled, authorized the establishment of maximum prices during the First World War and, although it did not contain any provisions permitting the recovery of the overcharges, made it a criminal offense to demand or receive prices higher than the maxima. In holding that the plaintiff, as a participant in the unlawful transaction, could not recover, the Circuit Court stated:

> "What the plaintiff did becomes of especial interest as bearing upon its legal right to maintain this action to recover back money paid by it by reason of its acquiescence in and cooperation with the defendant, in the assertion of the excessive price for

the coal in violation of the Lever Act, and as to which, from our viewpoint, the parties are in pari delicto. It is true the plaintiff paid out money which it need not have done; but that does not avail it, since in this class of cases the law will not lend itself to afford one of two wrongdoers relief against the other. On the contrary, it will leave them in the position in which they are found."

This Court has frequently recognized an exception to the general rule in cases where one of the parties is innocent and has rendered full performance of his side of the bargain, in good faith. This, for example, was the situation in cases such as *Daniels v. Tearney,* 102 U. S. 415, 26 L. Ed. 187 (1880), which involved a suit on a bond to stay execution which had been given by the defendant pursuant to the Secession Acts of the State of Virginia. In denying the defendant's plea that the bond was invalid, this Court pointed out (at 102 U. S. 420) that:

> "If parties are *in pari delicto,* the law will help neither, but leaves them as it finds them. But if two persons are in *delicto,* but one less so than the other, the former may, in many cases, maintain an action for his benefit against the latter."

A somewhat similar ruling appears in the recent decision of this Court in *A. C. Frost & Co. v. Coeur D'Alene Mines Corporation,* 312 U. S. 38, 61 S. Ct. 414 (1940). In that case, the plaintiff had an option to purchase up to 1,300,000 shares of treasury stock of the defendant corporation at 10¢ per share with the right to receive the proceeds of shares sold by the defendant on its own account in excess of 10¢ per share. The plaintiff ob-

tained 165,000 shares for which it paid the option price. The defendant, however, refused to deliver the remaining optioned shares and also refused to pay the plaintiff the credits it was entitled to on sales made by the corporation itself. In a suit to recover the amount of the credits and damages for the breach of the agreement, the defendant pleaded that the contract was unlawful because the stock had not been registered under the Securities Act of 1933. This Court, in reversing a judgment for the defendant, pointed out that the Securities Act contained several specific remedies but neither expressly invalidated the contract in suit nor created any remedy against its enforcement. The Court therefore upheld the contract, saying:

> "Courts have often added a sanction to those prescribed for an offense created by statute where the circumstances fairly indicated this would further the essential purpose of the enactment; but we think where the contrary definitely appears—actual hindrance indeed of that purpose—no such addition is permissible. The latter situation is beyond the reason which supports the doctrine now relied upon.
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> "* * * If it definitely appears that enforcement of a contract will not be followed by injurious results, generally, at least, what the parties have agreed to ought not to be struck down."

There is a definite parallel between the situation involved in the case just cited and the instant case. The Bituminous Coal Act, like the Securities Act of 1933, contains no provision invalidating the contract between the petitioner and the respondent; on the contrary, as

we have pointed out, an amendment which would have had that effect was stricken from the Bill in conference. In like manner, the Bituminous Coal Act does contain two specific remedial devices, both of them directed against the wrongdoer, viz., the person who has violated his statutory agreement under the Code. No remedy is awarded to the wrongdoer as against the buyer and the only provision which ever suggested such relief was eliminated from the final draft of the statute.

So far as the essential purpose of the statute is concerned, it certainly does not aid that purpose to award a premium to the one who violated the Act at the expense of an innocent party. Moreover, the innocent party in this case, if it had not relied upon the contract, could have procured its coal from other sources at other prices.

The Opinion of the Circuit Court sought to avoid these difficulties by comparing the Bituminous Coal Act with provisions of the Interstate Commerce Act prohibiting tariff discounts and rebates. The parallel, however, between the two statutes is faulty. The Interstate Commerce Act is a statute of general application applying to *all* carriers, to *all* shippers and to *all* travelers. Section 10 of the Act (49 U.S.C., Sec. 10) makes it a penal offense for any person to induce a carrier to discriminate or to obtain a concession or rebate by false billing or other improper means. In like manner, the Act of June 29, 1906 (49 U.S.C., Sec. 41) supplementing the Interstate Commerce Act forbids the shipper or traveler to accept or receive rebates, concessions or discriminations. On the basis of the clear intent of the Act to impose an obligation on the shipper and traveler, as well as on the

carrier, this Court has upheld the right of the carrier to recover unlawful discounts and rebates, regardless of its own participation in the wrong. Otherwise, this Court has pointed out, other shippers and travelers who had suffered from the discrimination would have been deprived of the protection which the statute sought to give them. Thus, in *Louisville & Nashville Railroad Company v. Maxwell,* 237 U. S. 94, 35 S. Ct. 494 (1915), the Court declared:

> "Under the interstate commerce act, *the rate of the carrier duly filed is the only lawful charge.* Deviation from it is not permitted upon any pretext. *Shippers and travelers are charged with notice of it, and they as well as the carrier must abide by it,* unless it is found by the Commission to be unreasonable. Ignorance or misquotation of rates is not an excuse for paying or charging either less or more than the rate filed. This rule is undeniably strict, and it obviously may work hardship in some cases, but it embodies the policy which has been adopted by Congress in the regulation of interstate commerce in order to prevent unjust discrimination." (Emphasis supplied)

The situation in the instant case is vastly different. The Bituminous Coal Act was not designed to aid other buyers of coal but to enable the producers of coal to enter into voluntary codes of fair competition. The statutory obligation is placed *solely* upon the *seller* of coal and any possible implication that the buyer should be bound to observe the Act or Code was eliminated from the legislation before final enactment. Moreover, although there is but *one rate* for *all* shippers and con-

signees under the Interstate Commerce Act, that was not true of the Coal Act and no person dealing with a seller of coal could be justly charged with notice that the coal could be sold at but one price. The petitioner, if it had been advised that the prices it was paying were unlawful, could have purchased its coal from non-members of the Code or from producers of non-bituminous fuel or it could have mined its own coal.

II.

THE CIRCUIT COURT'S DECISION HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN BUT SHOULD BE DECIDED BY THIS COURT.

The Bituminous Coal Act and the Code which it created were carefully engineered, as we have pointed out, to confine both their substantive measures and their enforcement devices to a select group, i.e., those sellers of coal who would be willing to trade the advantages of tax and anti-trust exemptions for the restrictive features of the Code. If Congress had wished to compel the buyer of coal to assist in policing the prices and practices of Code members by forcing the buyer to deal at his peril, it would have at least permitted some implication of such a duty to remain in the Act and would not have eliminated the only sections relating to sanctions against the buyer.

The Act, it is true, is no longer in effect. Nevertheless, in the course of its existence, there were undoubtedly hundreds of thousands of transactions coming under or near its ken. Since the decision of the Court below extends the substantive operation of the Act and

its remedial phases far beyond the Act's apparent scope to a class of persons who were not subject to it, the question involved appears to be of the utmost importance and one which should be determined by this Honorable Court.

Respectfully submitted,

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